

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

March 9, 1995

CARL STOECKER, : DISCRIMINATION PROCEEDING  
Complainant :  
v. : Docket No. CENT 94-200-D  
: MSHA Case No. DENV CD 94-11  
NORTH WESTERN RESOURCES :  
COMPANY, : Jewett Mine  
Respondent :

## DECISION

Appearances: Carl Stoecker pro se, Groesbeck, Texas,  
for the complainant;  
Frank Parker, Esq., Meier & Parker, L.C.,  
Bedford, Texas, for the respondent.

Before: Judge Feldman

This case is before me based upon a discrimination complaint filed on July 12, 1994, pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 815(c)(3) (the Act) by the complainant, Carl Stoecker, against the respondent, North Western Resources Company.<sup>1</sup> Stoecker alleges that his March 9, 1994, discharge was motivated by his protected safety related activities that occurred on November 12, 1993, February 22, 1994, and March 2, 1994. The respondent maintains Stoecker was terminated for misconduct associated with his repeated harassment of a fellow employee.

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<sup>1</sup> Stoecker's complaint which serves as the jurisdictional basis for this case was filed with the Secretary of Labor on March 21, 1994, in accordance with section 105(c)(2) of the Act, 30 U.S.C. ' 815(c)(2). Stoecker's complaint was investigated by the Mine Safety and Health Administration (MSHA). On June 14, 1994, MSHA advised Stoecker that its investigation disclosed no section 105(c) violations. On July 12, 1994, Stoecker filed his discrimination complaint with this Commission which is the subject of this proceeding.

This case was heard on November 29 through December 1, 1994, in Waco, Texas. At trial, the respondent stipulated that it is a mine operator subject to the jurisdiction of the Mine Act. The parties called a total of 23 witnesses. In support of his complaint Stoecker testified in his own behalf. In addition, Stoecker called a former employee of the respondent as well as eleven current employees. The respondent's direct case consisted of testimony by ten employees, seven of whom are management personnel. The parties posthearing briefs are of record.

The complainant asserts his discharge was motivated by three protected safety related incidents: (1) his November 12, 1993, inquiry into the qualifications of substitute crusher facilities operator Brian Hughes; (2) his February 22, 1994, expression of concern regarding the physical incapacity of fellow employee Marty Pringle to perform moderate to heavy lifting; and (3) his March 2, 1994, tool room conversation with Arlan Moravec concerning the recent formation of the company's "I" Team safety committee.

The respondent argues that safety complaints played no part in Stoecker's discharge. Rather, the respondent maintains Stoecker was discharged after March 2 and March 4, 1994, incidents of severe harassment of fellow employee Arlan Moravec. The latter incident involved a high speed chase and curbing of Moravec's vehicle only hours after Stoecker had been placed on suspension with pay (Decision Making Leave) for previously harassing Moravec.

The issues in this proceeding are whether any of the actions relied upon by Stoecker were protected under the act, and, if so, whether Stoecker's March 9, 1994, discharge was, in part, motivated by any protected act. If Stoecker prevails in showing that his termination was influenced by protected activity, the remaining issue is whether the respondent can affirmatively defend by showing that Stoecker's unprotected acts alone provided an independent basis for his discharge. For the reasons discussed below, the evidence reflects the November 12, 1993, and February 22, 1994, actions of Stoecker were protected by the Act. However, the respondent has met its burden of establishing that it would have terminated Stoecker for his unprotected misconduct alone without regard to any protected activity.

#### **Preliminary Findings of Fact**

The respondent, Northwestern Resources Company, is owned by Montana Power, a publicly traded company listed on the New York

Stock Exchange. Montana Power is a public utility serving the State of Montana and surrounding states with electricity and gas. The respondent has approximately 425 employees at its open pit mine in Jewett, Texas, which provides lignite coal to an adjacent power generating plant operated by Houston Light and Power Company.

Carl Stoecker was employed by the respondent from February 1, 1988, until his discharge on March 9, 1994. At the time of his discharge, he was an Oiler at the Lignite Handling Facility (crusher), a position he held since September 20, 1993. Stoecker worked the day shift from 7:00 a.m. to 7:00 p.m. William Posey, Crusher Oiler Supervisor, was Stoecker's supervisor for the last several years of Stoecker's employment, including at the time of his discharge. Posey reported to Superintendent John Allred.

The respondent does annual performance reviews of all employees. Posey evaluated Stoecker and discussed his appraisals with him. Stoecker's performance met or exceeded company standards. However, Stoecker had an acknowledged problem with loud, assertive and overbearing behavior that adversely affected his ability to interact with fellow employees. For example, at trial Stoecker acknowledged, although minimized, his problem by explaining that "not everybody is Henry Kissinger." (Tr. 101, 247). Stoecker also characterized himself as being "naturally loud", doing everything "in a strong way", and using his hands in a way that could be construed as "an intimidating factor." (Tr. 242, 247). Stoecker's own witnesses described him as "an intimidating person"; "high strung"; "disruptive"; "crawling up management's leg"; "overzealous"; "outspoken"; and "definitely not low-key". (Tr. 115-16, 191, 193, 238, 330).

Stoecker's problem dealing with people was noted in his evaluations. For example, for the review period ending July 1990, Stoecker was advised by Posey that he needed improvement in the area of his sensitivity to others. In response to this evaluation, Stoecker conceded that he was working on improvement in his communication skills. (Resp. Ex. 3). Subsequent evaluations noted a continuing problem with periods of improvement. (Resp. Ex. 4-6).

In the year preceding his discharge, Stoecker openly criticized many company benefits. He expressed doubts about the company life insurance policy questioning whether it would pay in the event of an employee's death; he criticized the company 401K deferred savings plan; he was critical of the company's pension plan; and he questioned the company overtime and promotion policies. (Tr. 583-588).

Respondent witness Tool Room Keeper Arlan Moravec testified there were company morale problems in 1993 in that employees feared the reporting of accidents could adversely impact upon their eligibility for wage increases. (Tr. 742-44). Vice President and General Manager Carroll Embry testified that he conducted a meeting in February 1993 with company personnel about cost containment including a wage freeze and the elimination of discretionary overtime. Embry stated Stoecker interrupted the meeting by voicing objections. Embry characterized Stoecker's behavior at the meeting as an "outburst." (Tr. 652-53). Stoecker apologized to Embry immediately after the meeting. (Tr. 674-675). However, the seriousness of Stoecker's misbehavior caused the respondent to prohibit Stoecker from attending future meetings on the subject. (Tr. 922).

Embry opined there was a high level of anxiety and "a terrible amount of union organizing activity at the mine in 1993." (Tr. 655-56). Beginning in May 1993 Stoecker developed an interest in unionization and became the Chairman of the International Brotherhood of Electrical Workers organizing effort at the Jewett Mine. (Tr. 799-802, 911-912, 924). Posey and Superintendent John Allred testified Stoecker campaigned for the union when he should have been working. (Tr. 800-01, 925-926). Allred received reports from fellow employees that Stoecker was spreading dissention by saying negative things about the company. (Tr. 812-13). Allred stated that "[he] got the impression that [Stoecker] had kind of self-appointed himself to be the job steward for everybody...[trying] to turn everything negative..." in order to stir up trouble and contention. (Tr. 824). The union organizing efforts ultimately failed.

#### The November 12, 1994, Brian Hughes Incident

On November 12, 1994, Stoecker became upset when he learned from Day Shift Supervisor Bill Dygert that Brian Hughes was assigned to cover the 7:00 p.m. to 7:00 a.m. night shift of Craig Oates as Lignite Facilities Handling Operator (crusher operator). The crusher operator has access to the control panel that energizes the crusher dump and the conveyor belts that ultimately transport the lignite to the utility power generating plant. (Tr. 73-76). Oates, the regular shift crusher operator, testified that he had trained Hughes for two or three shifts prior to November 12, 1993. (Tr. 212). Oates also indicated that he felt Hughes was task trained in that he was qualified to be a substitute for one shift. Oates stated he would not have taken the vacation day if he felt Hughes was not capable. (Tr. 212, 215).

William Gist, the facilities operator on the day shift testified that Hughes was capable of filling in at the crusher. Gist felt Hughes would be in no danger if the crusher automatically shut down as long as Hughes called maintenance as he was instructed instead of attempting to fix anything himself. (Tr. 71-72). Similarly, shift supervisor Greg Ivey indicated Hughes was instructed to stay in the crusher control room and to call maintenance in the event of any mechanical or electrical problems. (Tr. 699). In fact, even Stoecker conceded that Hughes could not have injured himself or others if he followed instructions by staying in the control room and calling maintenance in the event of trouble. (Tr. 553-60).

Stoecker was upset about Hughes' operation of the crusher because a few days earlier Stoecker had asked Posey about a promotion from Operator IV to Operator III and was told there would be no pay raise until he (Stoecker) was capable of operating the crusher. Stoecker then asked Gist how Hughes could be qualified to operate the crusher after one shift of training if Posey thinks he (Stoecker) is not qualified after more than six months of relevant training and experience.

Stoecker then called Posey at home. Stoecker asked Posey "...how they could put Brian Hughes operating the crusher when he was not qualified?" Stoecker stated Posey told him he was not aware of the problem and that Posey suggested Stoecker talk to night shift supervisor Greg Ivey. (Tr. 465-466). Posey characterized Stoecker's behavior during the phone call as "incoherent", "loud", "hollering" and "fairly mad". Posey stated Stoecker made no mention that his complaint was safety related and Posey assumed Stoecker was upset because he had not had an opportunity to run the crusher. (Tr. 932-33). Posey told Stoecker he would check into it when he returned to work. (Tr. 933).

Stoecker then went to the ready room and spoke to oncoming shift supervisor Ivey. Ivey testified Stoecker was angry at first but calmed down quickly. Ivey indicated Stoecker thought that he should have been given the opportunity instead of Hughes. Stoecker asked Ivey for the MSHA phone number. Ivey told him Safety Supervisor Dave Medick had it. (Tr. 696-697).

Stoecker called Medick at home. Stoecker said he didn't think Hughes was qualified to run the crusher from a safety standpoint and that he (Stoecker) had been trying to get some time on the crusher for advancement purposes. Although the precise nature of Stoecker's safety concerns are unclear, Stoecker testified that there were dangers associated with the conveyors if they were not properly locked out in the event of a

shutdown. (Tr. 29-30). Medick stated Stoecker was "very anxious about it and so was I." (Tr. 677-78). Medick called Ivey and was assured that Hughes was qualified to fill in and that precautions had been taken to prevent any hazard. (Tr. 679). Stoecker called Medick later that evening at which time Medick assured him Hughes could operate the crusher. Medick described Stoecker as being "comfortable with the solution" although "Stoecker was still concerned about his hours [on the crusher] that he was not getting in." (Tr. 680).

Supervisor Posey and Superintendent Allred investigated this matter. They were determined to put an end to Stoecker's abrasive and confrontational style. They decided to make an impression on him by getting his attention by putting him on Positive Discipline with a written warning. Allred, Posey and Stoecker met in Allred's office on November 18, 1993. Stoecker secretly recorded the meeting. A transcript of the meeting was admitted at trial without objection as Complainant's Exhibit 2. The thrust of the conversation was that Stoecker was being disciplined for disruptive behavior that undermined the company's goals and disturbed others during working time. Allred stated that the November 12, 1993, incident "put the icing on the cake." (Comp. Ex. 2). A written reminder was issued to Stoecker by Posey placing him on Positive Discipline for causing contention and unrest in the work force. Stoecker was requested to modify his behavior to alter his confrontational style so as to prevent the intimidation of others. (Resp. Ex. 1).

#### The February 22, 1994, Marty Pringle Incident

Upon reporting for work at approximately 6:10 a.m. on February 22, 1994, Posey advised Stoecker that he, Marty Pringle and Larry Bosworth were assigned to perform the bias test. The bias test involves filling 35 gallon containers with random samples of lignite and lowering the containers to the lower floor where they are crushed and tested for B.T.U. quality. (Tr. 38-39, 488). The sample containers vary in weight between 40 to 100 pounds. (Tr. 279-283).

Upon Pringle's arrival, Stoecker advised him that he, Stoecker and Bosworth were scheduled to work at the crusher for the bias test. Pringle, who is normally a heavy equipment operator, told Stoecker that he did not think he could do the lifting associated with the bias test because he had just returned to work a few days earlier after hemorrhoid surgery. Consistent with Pringle's demeanor at trial, Allred agreed that Pringle is a non-assertive, non-aggressive individual. (Tr. 824).

Stoecker related Pringle's concerns to Posey who said he would check with supervisor Gary Cooper. Posey also spoke to Allred. (tr. 814-816). Posey characterized Stoecker's conversation about Pringle as confrontational. (Tr. 1003). Allred described the conversation with Stoecker as a little aggressive, explaining "... I know Carl and I know how his nature is." (Tr. 825). Stoecker's witness Don Williams described the conversation with Posey and Allred as arguing in front of other employees and trying to tell management what to do. (Tr. 164-65). Posey discussed the matter with Cooper who assigned Waylen Levels to replace Pringle at the bias test. However, Levels, not knowing he was replacing Pringle for medical reasons, became upset. Thereafter, Pringle testified that Cooper insisted that Pringle perform the bias test by asking Pringle if "[he] liked working here." (Tr. 255). Pringle testified he performed the bias test to save his job because he was afraid Mr. Cooper "was fixing to take me to the gate." (Tr. 258).

#### The March 2, 1994, Tool Room Incident With Moravec

Arlan Moravec has been employed by the respondent for nine years and holds the position of Tool Room Keeper. Moravec is a disabled, physically small person who is recovering from kidney transplant surgery performed in June 1992. He also has difficulty walking due to hip problems that are related to his medication for his kidney condition. (Tr. 772). Moravec is a sensitive, good natured person who tries to make others happy by avoiding conflict. (Tr. 1006-07). His demeanor during his testimony demonstrated he is an anxious, timid individual who is easily confused. (Tr. 370-372, 385, 737-38). However, he is a competent maintenance mechanic and an asset to the company. (Tr. 875). Arlan Moravec has a good relationship with his fellow employees who like to joke with him and who affectionately refer to him as "Big A" because of his small size. (Tr. 961).

As noted above, the Safety "I" Team was formed in January 1994. The "I" Team consisted of four hourly and three management personnel that volunteered to form a committee to address safety related issues at the Jewett Mine. (Resp. Ex. 8). Posey, Stoecker's supervisor, was a management member of the Team. Moravec was enthusiastic about the concept and he was proud to be a Team member. (Tr. 1008-09). On the morning of March 2, 1994, Moravec was assigned to conduct a staff meeting, attended by Stoecker, to explain the function of the Team. Moravec explained that the "I" Team sat as a committee in order to receive employee suggestions about safety and communicate them to management for possible implementation.

Shortly after Moravec finished the meeting, Stoecker went to the tool room to reportedly get a hacksaw blade. Stoecker asked Moravec about the "I" Team. Moravec explained that employees bring problems or suggestions to the committee where they are discussed and presented to management. Moravec testified Stoecker stated "...what damn good does it do to go towards the management and they don't do anything. They're going to do what they want to do." (Tr. 746). Stoecker repeatedly asked, 'what if the "I" Team brings a problem to management and they do nothing about it?' Each time Moravec replied that if management is not responsive, the committee will meet again and resubmit the suggestion to management. Stoecker was not satisfied with Moravec's answer and Moravec testified that Stoecker repeated the same question "over and over and over." (Tr. 747).

The conversation was witnessed by several other employees including Mark Smith, Chuck Lenox, David Flowers, Alan Savage, Mike Adams, Bruce Szymanski and Bo Nelson, all of whom are hourly employees. Stoecker called Smith, Lenox and Flowers who all testified that Stoecker asked the same question two or three times and who all opined that they did not think Moravec was upset, although Smith admitted Moravec was easily excitable. (Tr. 371). Significantly, there is no evidence that either Smith, Lenox or Flowers has ever spoken to Moravec about the incident to determine whether he was in fact upset. (Tr. 365).

Savage and Adams were called by the respondent. They testified Moravec was upset and uncomfortable. (Tr. 724-25, 728). Adams stated the incident took 20 to 30 minutes and that Moravec "was shook" by the ordeal. (Tr. 728-29). Putting this question to rest, Moravec testified, "I wasn't getting anywhere and I was getting...I was getting pretty excited, I was getting hot." (Tr. 747). Moravec described the conversation as "loud". (Tr. 749-50).

Maintenance Supervisor Ronald Carmichael entered the tool room after hearing loud voices and the employees scattered. Carmichael stated Moravec looked stressed in that he was shaking and his face was red. Carmichael noted Stoecker's face was also red. Carmichael heard Stoecker tell Moravec the "I" Team was "just another bunch of bullshit." (Tr. 731-32). Carmichael reported the incident to Supervisor Larry Hardy who in turn reported it to Allred and Posey. (Tr. 818). Posey couldn't believe that Stoecker would get involved in a confrontation with someone like Moravec. (Tr. 961).

Allred and Posey decided Posey and Employee Relations Supervisor Bob Jenkines should investigate. Posey and Jenkines interviewed Moravec on March 2, 1994. Posey found Moravec to be pretty upset with his voice trembling. Moravec repeated that

Stoecker kept asking him the same question and wouldn't leave him alone. (Tr. 962). Posey concluded that Stoecker was out of control and that the November 18, 1993, Positive Discipline written reminder was ineffective. Posey and Allred decided that nothing less than Decision Making Leave (DML) would get Stoecker's attention. DML is paid leave providing time for the offender to consider his actions and to submit a written proposal for improvement. (Tr. 963).

On March 4, 1994, Posey and Allred called Stoecker to the crusher control room to inform him that he was being placed on DML. Stoecker secretly recorded the March 4 conversation which was transcribed and admitted in evidence without objection. (Comp. Ex. 2). Posey and Allred urged Stoecker to recognize his problems in dealing with fellow workers. They advised him not to be so overbearing and negative and to seek to contribute to a positive working environment. Posey and Allred repeatedly told Stoecker they were not trying to get rid of him. In fact, Posey stated:

...I don't have any other, any other, a (sic) recourse but to, but to let you think about it for a while Carl. So I'm going to extend this written to a DML, and a year from now we're going to work on this, and we're going to go ahead and continue to work on this thing. And I want you to keep quiet about what's going on. I want you to stay [to] yourself and to do your job. And we'll go at it like that. (Comp. Ex 2).

The memo from Posey to Stoecker placing him on DML reminded Stoecker of his November 18, 1993, written reminder and requested Stoecker to address in his written plan for improvement ways in which Stoecker would:

- (1) refrain from being disruptive in his conduct toward co-workers during working hours;
- (2) refrain from making comments to co-workers that would cause contention and unrest;
- (3) cease interrogating co-workers; and
- (4) cease getting in other people's faces with his opinions. (Resp. Ex. 2).

Stoecker was to report back to work with his written commitment on March 10, 1994. The meeting placing Stoecker on DML ended at approximately 2:00 p.m. on March 4, 1994.  
The March 4, 1994, Chase and Curbing of Moravec

Stoecker left the mine site at approximately 2:00 p.m. on March 4, 1994, after being placed on DML. He drove to the nearby

town of Jewett for a sandwich and returned to the mine entrance to await Moravec whose workday ended at 2:30 p.m. When Moravec's vehicle left the mine, Stoecker followed in his vehicle, a large crew cab truck with dark windows. Moravec was not familiar with Stoecker's truck and did not know who was following him. Stoecker rapidly caught up to Moravec on Highway 39.

Stoecker followed Moravec onto Farm Road 80, a deserted road with hills and curves. At times the vehicles reached speeds of 70 miles per hour. Stoecker flashed his headlights but Moravec was too frightened to pull over. Moravec's fear intensified and he wished he could get out of this farm area to an area where there were people. He was concerned that he could not defend himself because his anti-rejection drugs impaired his hips and his ability to run.

Moravec thought about leading the person following him to his brother-in-law's house which was located just past the town of Donie. As Moravec approached the town of Donie, where Highway 164 intersects with Farm Road 80, Moravec thought "I need to get to people, and I knew never to drive to my own home if somebody was after me." (Tr. 763). In Donie, Moravec hit traffic which caused him to slow down. As Moravec attempted to turn left, Stoecker's truck cut Moravec off forcing him to stop in the Donie State Bank parking lot. Moravec kept his doors and windows locked and his car running in case he needed to get away quickly. Although Moravec thought it could be Stoecker, he was not sure until Stoecker exited his truck and approached Moravec's passenger side window.

As Stoecker approached, Moravec testified, "I didn't know what to expect. You know, I've seen people where you think people are nice, but can explode at the last minute. I really didn't know what to think, but as Carl came around, he held his cool." (Tr. 764-65). Once again, Stoecker secretly taped the conversation with Moravec. (Comp. Ex. 2). Moravec stated Stoecker asked him if he (Stoecker) upset him the other day in the tool room. Moravec replied, "yeah, Carl, you did."

Moravec was so upset that he called his brother-in-law Dean Gatzemeier who is an engineer at the Jewett Mine. Then Moravec, who had never previously been to Posey's home, went to see Posey. Posey stated Moravec arrived trembling. Moravec related his encounter with Stoecker earlier that day at the Donie State Bank. Gatzemeier called Allred and criticized Allred and Posey for identifying Moravec in the DML meeting. Gatzemeier told Allred "you guys put Arlan in a heck of a fix....you put his safety in jeopardy." (Tr. 831). Allred promised Gatzemeier he would call Moravec. Allred called Posey to inform him about the

incident and was told that Moravec was at Posey's home. Allred apologized to Moravec. (Tr. 830-33, 968-71).

Allred, Posey and Jenkins decided the chase and curb incident left no other recourse other than recommending termination. The decision to discharge Stoecker was affirmed by Vice President and General Manager Embry. On March 9, 1994, Stoecker was called in to the personnel office. In the presence of Allred, Posey and Jenkins, he was discharged for violations of the company's policy prohibiting harassment. (Tr. 895-96). Stoecker was told his termination was for continued harassment of fellow employees and no specific reference was made to the chase and curbing incident to spare Moravec from further abuse. (Tr. 842-44, 973-79, 1009-10).

### Disposition of Issues

#### Further Findings and Conclusions

##### Discriminatory Discharge

The guiding principles governing whether Stoecker is entitled to the statutory protection provided by section 105(c) of the Act are well settled. Stoecker, as the complainant in this case, has the burden of proving a *prima facie* case of discrimination under section 105(c) of the Mine Act. In order to establish a *prima facie* case, Stoecker must establish that his November 12, 1993, February 22, 1994 and/or March 2, 1994, actions constituted protected activity, and, that the adverse action complained of, in this case his March 9, 1994, discharge, was motivated, in part, by protected activity. See Secretary on behalf of David Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980) rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Thomas Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981).

The respondent, Northwestern Resources Company, may rebut a *prima facie* case by demonstrating either that no protected activity occurred or that Stoecker's discharge was in no part motivated by protected activity. Pasula, 2 FMSHRC at 2799-800. If the respondent cannot rebut the *prima facie* case in this manner, it may nevertheless affirmatively defend against the *prima facie* case by establishing that it was also motivated by Stoecker's unprotected activity and that it would have discharged Stoecker for the unprotected activity alone. 2 FMSHRC at 2800; Robinette, 3 FMSHRC at 817-18; See also Jim Walter Resources,

920 F.2d at 750, citing with approval Eastern Associated Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Donovan v. Stafford Construction Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test). The respondent has the burden of proving an affirmative defense. Haro v. Magma Copper Company, 4 FMSHRC 1935 (1982). However, the ultimate burden of persuasion does not shift from the complainant. Robinette, 3 FMSHRC at 817-18.

### Protected Activity

It is axiomatic that a miner has an absolute right to make good faith safety or health related complaints about mine practices or conditions when the miner believes such circumstances pose hazards. Secretary of Labor ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary of Labor ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). A complaining miner does not have an obligation to demonstrate that the condition complained of contributes to an immediate hazard if, as in this case, the complaint does not involve a work refusal. Secretary o.b.o. Ronny Boswell v. National Cement Company, 16 FMSHRC 1595, 1599 (August 1994).

Communication of potential health or safety hazards and responses thereto are the means by which the Act's purposes are achieved. Once a reasonable good faith concern is expressed by a miner, an operator, usually acting through on-the-scene management personnel, has an obligation to address the perceived danger. Boswell v. National Cement Co., 14 FMSHRC 253, 258 (February 1992); Secretary o.b.o. Pratt v. River Hurricane Coal Company, Inc., 5 FMSHRC 1529, 1534 (September 1983); Secretary of Labor v. Metric Constructors, Inc., 6 FMSHRC 226, 230 (February 1984), aff'd sub nom. Brock v. Metric Constructors, Inc., 766 F.2d 469 (11th Cir. 1985). An operator must address a miner's concern in a way that reasonably quells the miner's fears. Gilbert v. FMSHRC, 866 F. 2d 1433, 1441 (D.C. Cir. 1989).

In summary, a miner's willingness to express safety and health related complaints should be encouraged rather than inhibited. Such protected complaints may not be the motivation for adverse action against the complainant by mine management personnel.

#### A. The November 12, 1993, Complaint Concerning Hughes

The Commission has noted that in order for a complaint to be protected, the complaining miner must have a "good faith, reasonable belief in a hazardous condition" and that a showing of

good faith requires an "honest belief that a hazard exists." Thus, the complainant is not required to prove that an actual hazard existed. He must only show that his complaint was reasonable. See Secretary o.b.o. Clayton Nantz v. Nally & Hamilton Enterprises, Inc., 16 FMSHRC 2208, 2211 (November 1994), and cases cited therein.

In the current case, it is clear that Stoecker's November 12, 1993, inquiry concerning the qualifications of Brian Hughes to run the crusher on an interim one shift basis was protected under the Act. While I am not unmindful that Stoecker's primary concern was his self interest in promotional opportunities, the respondent concedes that Hughes was a novice crusher operator. Both Safety Supervisor Medick and Shift Supervisor Ivey testified that Stoecker's complaint justified further inquiry on their parts to ensure that Hughes had been properly instructed on how to avoid danger to himself or others in the event of an unforeseen emergency. Although Stoecker's complaint was in large part motivated by his desire for advancement, such desire does not taint the reasonable safety related nature of his November 12, 1993, complaint.

The November 12 Hughes incident precipitated the November 18, 1993, Positive Discipline written reminder. While the written reminder may also have addressed Stoecker's past misbehavior, the respondent's assertion that Stoecker's November 18, 1993, written reminder was not in any way related to his contemporaneous Hughes complaint is unpersuasive. Therefore, it is apparent that Stoecker's November 18, 1993, Positive Discipline was based, in part, on his November 12, 1993, protected complaint. However, the adverse action for which Stoecker seeks relief is his March 9, 1994, discharge rather than his November 18, 1993, Positive Discipline. Thus, the dispositive issue is what role, if any, did the Positive Discipline play in Stoecker's termination.

#### B. The February 22, 1994, Complaint Concerning Pringle

The testimony of Marty Pringle reflects that he had a sincere and legitimate concern about his capacity to withstand the rigors of the bias test given his recent hemorrhoid surgery. This concern was recognized by Waylen Levels when he testified that he would have volunteered to replace Pringle at the bias test if he had known of Pringle's condition.

Allred conceded Pringle is a non-aggressive, non-assertive individual. Therefore, it is not surprising that Pringle was reluctant to communicate his incapacity to management personnel. As noted above, the provisions of section 105(c) of the Act are intended to encourage operators to quell the fears of miner's

when they raise health related concerns. Management's implicit threat to Pringle concerning 'whether Pringle liked to work here,' is precisely the reaction the Mine Act seeks to dissuade.

Even counsel for the respondent conceded that Stoecker had not "done anything horribly wrong" although it was just another incident of Stoecker's tendency to meddle in other people's business.

Consequently, it is obvious that Stoecker's complaint regarding Pringle's medical condition was reasonable under the circumstances and protected under the Act. The respondent maintains that this incident had nothing to do with Stoecker's discharge. However, Stoecker relies on Allred's reference to the Pringle matter in his March 4 Decision Making Leave meeting as evidence that this incident also motivated his discharge.

### C. The March 2, 1994, Tool Room Incident

Stoecker maintains that his March 2, 1994, actions in the tool room constitute protected activity because he was discussing the "I" Team safety procedures with fellow employee Arlan Moravec. I disagree. The question repeatedly asked by Stoecker had nothing to do with safety procedures, was rhetorical in nature and was not asked in good faith. Moreover, Stoecker's behavior must be viewed in the context of his documented and acknowledged problems involving his difficulties in relating to others. Stoecker's shortcomings in his dealings with people was best described by Stoecker when he stated, "I am not Henry Kissinger." (Tr. 53). Stoecker's admitted lack of diplomacy could not have been focused on a more vulnerable victim than Arlan Moravec.

Teasing, harassing and intimidating are not activities protected by the Act. Such activities cannot be legitimized by a transparent attempt to mask them in "a question about safety procedures". An operator has an unfettered right to ensure that its workers are not antagonized by fellow employees. Stoecker's insistence that he did not upset Moravec in the tool room on March 2, 1994, is unsupported by the reality of Moravec's testimony. Moravec was a compelling witness who told a regrettable story. His testimony is entitled to great weight. Accordingly, I can construe nothing in Stoecker's conversation with Moravec that even remotely resembles protected activity.

Finally, even Stoecker does not allege his March 4, 1994, chase and forced interrogation of Arlan Moravec in the parking lot of the Donie State Bank was protected activity. (Tr. 998-999, 1011-14). While presumably unintended, Stoecker's actions

terrorized Moravec. Obviously, such conduct provides a reasonable basis for severe disciplinary sanctions.

### Ultimate Findings and Conclusions

As discussed above, the November 12, 1993, complaint concerning Hughes and the February 22, 1994, complaint about Pringle's incapacity are protected acts. Since the November 12, 1993, complaint was immediately followed by Positive Discipline and the February 22, 1994, complaint was noted in the March 4, 1994, DML meeting, Stoecker has presented a *prima facie* case that the adverse action he complains of, *i.e.*, his March 9, 1994, discharge, was motivated, at least in small part, by these protected acts.

However, the relief provisions of section 105(c) of the Act, which include back pay and reinstatement, are not available to a complaining miner if his non-protected activity is so egregious as to provide an independent basis for the adverse action complained of. Such circumstances constitute an affirmative defense to a miner's discrimination complaint. Under such circumstances, a miner cannot insulate himself from the consequences of his own misconduct, which alone warrants dismissal, simply because he has engaged in past protected activity.

The Commission has noted that an operator may affirmatively defend by proving that it would have disciplined a miner for unprotected activity alone by showing prior consistent discipline for similar infractions, the miner's unsatisfactory work record, prior warnings to the miner, and rules or practices prohibiting the conduct at issue. See Lonnie Ross and Charles Gilbert v. Shamrock Coal Company, Inc., 15 FMSHRC 972, 975 (June 1993) citing Bradley v. Belva Coal Company, 4 FMSHRC 982, 993 (June 1982). In this matter, a significant contributing cause of Stoecker's discharge was his harassment of Moravec in the tool room on March 2, 1994. The proximate cause of termination was Stoecker's terrorization of Moravec during his chase and interrogation only two days later on March 4, 1994. This conduct constitutes a blatant violation of the respondent's policy prohibiting harassment.

With respect to a history of unsatisfactory conduct, it is noteworthy that virtually every witness supported the respondent's contention that Stoecker was frequently combative and confrontational in his dealings with management and co-workers. The evaluations of record as well as the November 18, 1993, Positive Discipline as it relates to Stoecker's

confrontational style are convincing evidence of prior warnings about his behavioral problem.

Moreover, despite Stoecker's past behavior, Stoecker's secret tape of the March 4, 1994, DML meeting establishes that Allred and Posey had no intention of firing Stoecker until the chase incident occurred later that day. In fact, during the meeting Posey encouraged Stoecker and stated he was willing to work with Stoecker over the next twelve months in improving his sensitivity to the feelings of others. Similarly, Allred's incidental reference to the Pringle matter as evidence of Stoecker's aggressive nature did not alter Allred's expressed willingness to retain Stoecker's services.

However, inexplicably, less than one hour after being placed on DML for harassing Moravec in the tool room, Stoecker was on the chase and at it again in the Donie State Bank parking lot. This conduct demonstrated that Stoecker was incapable of change, and, alone, provided a reasonable and justifiable basis for his discharge.

Consequently, the respondent has met its burden of establishing, by the preponderance of the probative evidence of record, that although Stoecker had engaged in past protected acts, his March 9, 1994, discharge was also motivated by Stoecker's unprotected activities, and, that these activities alone warranted his termination. Therefore, the respondent has established an affirmative defense to Stoecker's assertion that he was the victim of a discriminatory discharge.

As a final note, this Commission's jurisdiction is limited to ensuring that miners' rights under the Act are protected. In this regard, the Commission has stated its function is not to pass on the wisdom or fairness of the asserted justifications for a particular business decision, but rather to determine if such justifications are credible, and, if so, whether they would have motivated the operator as claimed. Bradley v. Belva, 4 FMSHRC at 993. Here, it is clear the respondent's reliance on harassment as an independent justification for Stoecker's discharge, particularly after the last act of harassment occurred shortly after Stoecker was placed on Decision Making Leave for harassment, is credible and not pretextual in nature. Whether or not Stoecker's discharge was also motivated by his union organizing activities goes beyond the scope of this proceeding. Accordingly, Stoecker's complaint must be dismissed.

**ORDER**

Stoecker's participation in unprotected activity on March 2 and March 4, 1994, provided a justifiable and independent basis for his March 9, 1994, discharge. Therefore, the discrimination complaint filed by Carl Stoecker against the Northwestern Resources Company **IS HEREBY DISMISSED.**

Jerold Feldman  
Administrative Law Judge

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